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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 572

PRESLEY GREGORY,

Petitioner,

vs.

HON. WILLIAM J. CAMPBELL, Chief Judge, United States District Court for the Northern District of Illinois, Eastern Division,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

PRESLEY GREGORY,

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vs.

HON. WILLIAM J. CAMPBELL, Chief Judge, United States District Court for the Northern District of Illinois, Eastern Division,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Presley Gregory, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on November 5, 1959.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment order of the United States Court of Appeals for the Seventh Circuit, denying the petition for emergency writ of mandamus against the respondent, was filed November 5, 1959, and is not reported but is set forth in the Appendix hereto and in the certified record transmitted herewith.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit denying emergency writ of mandamus was entered on November 5, 1959. This petition is filed within ninety days thereafter. Jurisdiction is conferred on this Court by 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Does not Civil Rule 21 of the United States District Court for the Northern District of Illinois providing for one jury trial on the element of liability in a personal injury case and another jury trial on the element of damages in the same case, deny, abridge and modify petitioner's right to trial by jury as declared by the Seventh Amendment to the Constitution of the United States and as given by the statutes of the United States, Supreme Court Rule and as provided by the common law?

2. Is Civil Rule 21 adopted on November 2, 1959, and immediately applied on November 3, 1959, to the trial of a long prior pending case, within the power of the District Court, when that rule changes the manner of trial in civil jury cases, which is of long and ancient standing, established by the Constitution, statutes of Congress, the Rules of the Supreme Court of the United States and as provided by the common law?

3. In a negligence action are not the elements of negligence, due care, proximate cause and damages inseparable elements which must be determined by one jury and at the same time?

4. Do not the requirements of two trials invoke undue hardship on parties, witnesses and courts to the detriment of good and proper administration of justice and to the prejudice of litigants?

5. Is not Civil Rule 21 a usurpation of this Court's legislatively-bestowed rule-making power and in direct conflict with Rule 83 and Rule 38 of the Federal Rules of Civil Procedure?

CONSTITUTIONAL, STATUTORY AND FEDERAL RULES PROVISIONS INVOLVED.

1. Seventh Amendment, Constitution of the United States:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. Title 28 U.S.C.A., Sec. 2072:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at the beginning of a regular session and until after the close of such session.
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit,

supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended May 24, 1949, c. 139, Sec. 103, 63 Stat. 104; July 18, 1949, c. 343, Sec. 2, 63 Stat. 446."

3. Rule 38 (a). Rules of Civil Procedure for the United States District Courts.

"Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

4. Rule 83. Rules of Civil Procedure for the United States District Courts:

"Rules by District Courts. Each district court by action of a majority of the judges thereon may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

5. Rule 21. *Civil Rules of the United States District Court for the Northern District of Illinois:*

"SEPARATION OF ISSUES IN CIVIL SUITS

Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim or third-party claim.

In the event liability is sustained, the Court may recess for pre-trial or settlement conference or proceed with the trial on any or all of the remaining issues before the Court, before the same jury or before another jury as conditions may require and the Court shall deem meet.

The Court, however, may proceed to trial upon all or any combination of issues if, in its discretion, and in furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation."

STATEMENT OF THE CASE.

On March 13, 1957, Presley Gregory, a driver of a public carrier, Checker Taxi Company, was transporting passengers, Mary Mix and Thomas D. Folan, in Chicago, Illinois. There was a collision between the cab and a locomotive owned by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company as a result of which Presley Gregory was injured and Mary Mix and Thomas D. Folan were killed. On March 26, 1957, Gregory filed a negligence action against the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in the United States District Court for the Northern District of Illinois, under Cause No. 57 C 543. Subsequently, the administrators of the estates of the deceased passengers filed suit in the same court against the Checker Taxi Company and the railroad under Cause No. 58 C 307. In each of these cases, trial by jury was demanded, and the cases were consolidated by order of court.

On the 3rd day of November, 1959, respondent, the Honorable William J. Campbell, Chief Judge, United States District Court for the Northern District of Illinois, set the consolidated causes of action for trial to begin on November 9, 1959, and at the same time or-

dered that the case be tried before a jury in what respondent described as a trial on the "liability" aspect of the case *only*. Respondent further provided that the damage aspect be deferred for future trial. Civil Rule 21 of the United States District Court for the Northern District of Illinois passed just one day previous to respondent's order, November 2, 1959, was the basis for respondent's setting the trial on what he described as the liability aspect *only*.

On the 4th day of November, 1959, petitioner moved respondent to vacate the order of November 3, 1959. Respondent denied the motion. Respondent, upon petitioner's request, refused to enter an order in the form of a certificate that would permit interlocutory appeal pursuant to 28 U.S.C. 1291.

On the 5th day of November, 1959, petitioner filed in the United States Court of Appeals for the Seventh Circuit an emergency petition for writ of mandamus and for emergency stay of any proceedings in the case in the United States District Court for the Northern District of Illinois, pending disposition of the petition for emergency writ of mandamus. In that petition, the United States Court of Appeals for the Seventh Circuit was requested to vacate respondent's order of November 3, 1959, which directed a separate trial on the so-called aspect of liability *only* and which provided for a future trial on the issues of injuries and damages. It was further requested that the United States Court of Appeals for the Seventh Circuit require the respondent to conduct a trial of the consolidated causes in the manner heretofore prescribed by law without regard for newly-adopted Rule 21.

On the same day, the United States Court of Appeals for the Seventh Circuit summarily denied the petition

for writ of mandamus directed against respondent. (This order appears in the Appendix hereto.)

On the 9th day of November, 1959, petitioner applied to respondent for a stay of proceedings of consolidated causes No. 57 C 543 and No. 58 C 307 in the United States District Court for the Northern District of Illinois pending review on certiorari of the above-entitled cause in this Court. On the 9th day of November, 1959, respondent granted petitioner's application for stay pending review on certiorari and the consolidated causes were continued generally to be reset for trial immediately upon the disposition of the matters pending in this Honorable Court.

Jurisdiction of the United States District Court for the Northern District of Illinois is conferred by Title 28 U.S.C., Sec. 1332 in that Presley Gregory is a citizen of the State of Illinois and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a citizen of the State of Wisconsin and the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00).

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. Involved is the important question of whether enforcement of Civil Rule 21 of the United States District Court for the Northern District of Illinois destroys petitioner's right to trial by jury as secured to him by the Seventh Amendment to the Constitution of the United States.

2. Involved is a departure from the accepted and usual course of judicial proceedings, which calls for an exercise of this Court's supervisory powers.

3. Resolution of this question will affect the manner of trial in all civil proceedings in the Northern District

of Illinois and will serve to avoid a conflict in the District Courts of the Seventh Circuit and with other districts throughout the country.

I.

Judicial process in which petitioner is prevented from introducing evidence as to his injuries and the relationship between the damages and the negligence of the railroad in the first instance is in direct violation of the common law principles of trying the issues *en bloc*. Except for the peculiar action in account and in a multiple court action wherein a plea was interposed as to one count, the severance of issues was unknown to the common law. Millar, *Civil Procedure of the Trial Court in Historical Perspective*, 272 (1952). Witnesses once called were allowed to "give in evidence all that they knew concerning the truth of the fact, concerning which the parties are at issue." Pound, *Readings on the History and System of the Common Law*, 125-126. After hearing the evidence, the jury then returned a *single verdict*. *McKeon v. Central Stamping Co.*, 3rd Cir., 264 Fed. 385, 388.

This Court in at least three decisions has implicitly recognized this underlying philosophy of the common law as guaranteed by the Seventh Amendment.

In *Miller v. American Bonding Co.*, 257 U.S. 304, 42 S.Ct. 98, a party's demand for a separate trial was refused. This Court said at page 308:

> "In actions at law the general practice is to try all the issues in a case at one time; and it is only in exceptional instances where there are special and persuasive reasons for departing from this practice *that distinct causes of action* asserted in the same case may be made the subject of separate trials. Whether this may be done rests in the court's discretion." (Emphasis ours)

Segmentation of issues was disapproved also in *Hodges v. Easton*, 106 U.S. 408, 1 S. Ct. 307, 27 L.Ed. 169. This Court held that taking a special verdict without a general verdict and fixing damages with submission of that issue to the jury contravened the Seventh Amendment, stating that a party has a right to a jury trial on all issues of fact. Mr. Justice Harlan for the Court at pages 412-413 said:

> ". . . It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver . . . .
>
> One other point discussed by counsel for defendants in error must be noticed. He insisted that the order of reversal, if one be made, should be accompanied by a direction to the court below to restrict the next trial to such issues as are not covered by the answers of the jury to special questions. In support of this position, we have been referred to several adjudications which seem to recognize the authority of the court, when setting aside a judgment, to restrict the subsequent trial to such issues as were not passed upon by the jury at the first trial. Whether this contention be sound or not, we need not now determine, for the reason that the grounds upon which it rests have no existence, where, as here, the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law. There is, then, no alternative but to reverse the judgment, with directions that a trial be had upon all the material issues of fact . . ."

The question of different triers of different factual issues was before this Court in *Barney v. Schneider*, 9 Wall. 248, 76 U.S. 248, 19 L. Ed. 648. There the trial judge summarized for the jury facts as determined in a former hearing. In holding that this procedure violated the Seventh Amendment, this Court said:

> "But we have never before heard of a case in which the jury were permitted, much less instructed, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them in the charge of the court. It is obvious that if such a verdict can be supported here trial by jury may be preserved in name, but will be destroyed in its essential value, and become nothing but the machinery through which the court exercises the functions of a jury without its responsibility."

Separation of trials into "liability" and "damages" contemplates a procedure by which the first jury hears evidence of "how" the collision or other act happened and the second jury hears the alleged results of the occurrence. Unless there is to be a complete repetition of the first trial, the second jury will only be apprized of the conclusions of the first or what the trial judge *says* were the conclusions. The second twelve people would then be making a finding of damages on the hearsay of other trier's conclusions.

Failure to submit all of the issues at the same time stands not alone in violation of common law right to trial by jury and in derogation of the Seventh Amendment. This vice is attended by the enlargement in the number of triers of the facts. In *Patton* v. *United States*, 281 U.S. 276, 288, this Court defined trial by jury as follows:

> "... 'trial by jury'. That it means a trial by jury, as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. These elements were —(1) *that the jury should consist of twelve men, neither more nor less;* (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." (Emphasis ours)

Rule 21 provides a second trial "before the same jury or before another jury as conditions may require." A litigant's exposure to twenty-four triers of the facts is in derogation of trial by jury as known in American jurisprudence adopted from the common law of England.

> ". . . Such restricted trial, where the whole case is not submitted in toto to a jury of twelve men, is not the trial by jury guaranteed by the Seventh Amendment of the federal Constitution, and was therefore beyond the power of the court below to impose on the defendant. . ." *McKeon* v. *Central Stamping Co.*, 3 Cir., 264 F. 385, 389

There is yet another violation of litigants' rights inherent in Rule 21. The second jury, though impaneled to determine damages only, would be required to know something about the facts resulting in the injury. They could not be expected to translate medical testimony into a verdict of dollars and cents without knowing something of the facts of the occurrence. This would entail either the court's informing them of what the prior jury had determined as to liability or their hearing a repetition of the evidence in the first case. The *Barney* decision condemns the first practice and that provision of the Seventh Amendment providing "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law" prohibits the second.

II.

Civil Rule 21 has so far departed from the accepted and usual course of judicial proceedings, sanctioned by the United States Court of Appeals for the Seventh Circuit, as to call for an exercise of this Court's power of supervision. It attempts to regulate personal injury litigation of which a negligence action is a type. Under

Illinois law, as in many states, the elements of such a case are:

(1) a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed;

(2) the failure to perform that duty;

(3) a consequent injury so connected with the failure to perform the duty that the failure is the proximate cause of the injury.

Illinois Central R.R. Co. v. *Oswald*, 338 Ill. 270, 273.

By requiring that the first phase of the case be restricted to what respondent refers to as "liability" *only*, litigants are prevented from having their day in court. By excluding evidence of injuries and damages, it is absolutely impossible for a jury to determine "liability". Without damages and injuries, there can be no liability. The element of liability necessarily includes the element of damages. How may the second jury assess damages if it has not determined that defendant's negligence was the proximate cause of the plaintiff's injuries?

By the same token, how can the first jury determine liability without benefit of knowing the nature and extent of the plaintiff's injuries? How can a jury find "liability" without a basis for concluding that the injuries were proximately caused by the negligence of the defendant?

These problems engendered by Rule 21 are not restricted to one class of litigants. Parties plaintiff and defendant are equally restricted in proof of their respective theories of both negligence and damages. A negligence action involves a panoramic view of events lead-

ing up to a given occurrence and an equally all-encompassing perspective of that which follows. To interrupt the free flow of facts is to prohibit a coherent presentation and to preclude a just determination.

Proof in negligence actions does not differ from proof in actions based on fraud; an indispensable element of each is that of damage. *United States ex rel. Rodriguez v. Weekly Publications, Inc., et al.*, 9 F.R.D. 179, a district court case from the Southern District of New York, involved a statutory fraud action. The plaintiff sought a "separate trial of the issues of liability and damages." The court in holding that separability was not feasible said at page 180:

> "In the instant case, the segregation of the issues of liability and damages and their trial to two separate juries would mean that the first jury would be confronted with the question of fraud in the abstract without the necessary connection to specific damage and the second jury would be confronted with the issues of damages without having before it the links which unite them to the fraud."

In *McClain v. Socony-Vacuum Oil Co.*, 10 F.R.D. 261, the United States District Court for the Southern District of Missouri, at the instance of a defendant, refused to separate damages from liability in a Clayton Act case. The court held there was no issue of liability separate and apart from damages.

Though ostensibly seeking to curtail undue delay in the administration of justice, Rule 21 can have but an opposite effect. Two sets of jurors for the same cause, separation of time between verdicts on liability and damages, and duplication of trials of the same case can be expected to cause havoc with district court judicial administration.

Witnesses cognizant of information pertinent to the factual aspect of any occurrence are often aware of facts pertaining to damages and injuries. Passengers in automobiles, cabs, trains and planes; policemen and firemen investigating accidents; doctors who come to the aid of injured people at the locus of the tort; all would be required to testify in the "liability" aspect of the case. Their inability to testify to knowledge of relevant facts concerning injuries and damages in the first phase of the litigation would require them to return for the second. This duplication of testimony would produce reluctant witnesses for litigants whose cause of action would become impractical, if not impossible, to pursue.

A jury system contemplating a divided verdict in which 24 men, in two separate juries of 12 each, pass on only parts of the case constitutes so violent a departure from the accepted and usual procedure as to require either the prohibition or approbation of this Court.

III.

The Congress in Title 28 U.S.C.A., Sec. 2072, has placed additional security around the right of trial by jury by requiring that this Court's Rules as to the practice and procedure of the district courts "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

This Court, author of the Rules of Civil Procedure for the United States District Courts, in Rule 38 (a) has specifically preserved the right of trial by jury as declared by the Seventh Amendment to the Constitution. Those same rules in Rule 83 grant district courts power to regulate their practice "not inconsistent" with the Rules of Civil Procedure.

The Supreme Court, "having proceeded to regulate this subject-matter, their regulation must be regarded complete and exclusive, inhibiting what it does not allow, as well as governing what is fixed by positive appointment." *The Merchant*, D.C. N.Y., 17 Fed. Cas. 31, No. 9,434.

Compare *Atlass* v. *Miner*, 265 F.2d 312, 319, now pending on certiorari before this Honorable Court, wherein the Court of Appeals for the Seventh Circuit spoke against the same District Court's local revision of Admiralty Rules:

> "The plain and simple course here is by Supreme Court amendment with Congressional sanction."

Rule 21 involves an area peculiarly within this Court's prerogative to act and is in direct conflict with that mandate of this Court which has regulated trial by jury in the district courts. By invoking Rule 21 the district court, sanctioned by the court of appeals, is in conflict with other district courts in other circuits which have decided that causes of action in which damages are an integral part of the action cannot be separated from what is loosely called the liability feature of the case. (*United States ex rel. Rodriguez* v. *Weekly Publications, Inc., et al.*, 9 F.R.D. 179; *McClain* v. *Socony-Vacuum Oil Co.*, 10 F.R.D. 261).

Until this Court will resolve the question as to the district court's right to change the long accepted and long cherished method of trial by jury, the District Court for the Northern District of Illinois will be in conflict not only with district courts in other circuits but will also lack harmony with district courts within the seventh circuit.

CONCLUSION.

Petitioner sought an order from the district court which would have allowed an interlocutory appeal in this matter. Refusal of that request made necessary the petition for the extraordinary remedy of mandamus which has been denied by the United States Court of Appeals. That this remedy was the most logical upon which to proceed was exemplified by this Court in *Ex parte Simons*, 247 U.S. 231, 239, 240:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the District Court to produce and to give the plaintiff her right to a trial at common law. See *Brown* v. *Circuit Judge of Kalamazoo County*, 75 Michigan 274."

Though the motives of the United States District Court for the Northern District of Illinois may be quite commendable, adoption of Rule 21 is tantamount to the same district court's attempt to make rules in admiralty. The United States Court of Appeals for the Seventh Circuit specifically condemned the practice, declared the rule invalid and issued its writ of mandamus prohibiting the district judges of the Northern District of Illinois from enforcing their rule. *Atlass* v. *Miner*, 7 Cir., 265 F.2d 312.

This honorable Court has issued its writ of certiorari in the *Atlass* case. It is respectfully urged that there are equally compelling reasons for granting its writ in case at bar.

Respectfully submitted,

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APPENDIX I.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Thursday, November 5, 1959
Before
Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

PRESLEY GREGORY,
Petitioner,
No. 12825 vs.
HON. WILLIAM J. CAMPBELL, Chief Judge, United States District Court for the Northern District of Illinois, Eastern Division,
Respondent.

Original Petition for Writ of Mandamus.

This matter comes before the Court on the emergency petition of Presley Gregory for writ of mandamus and for emergency stay of proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, in consolidated causes Nos. 57 C 543 and 58 C 307 pending disposition of said petition by this Court.

On consideration whereof:

It Is Hereby Ordered and adjudged by this Court that the said emergency petition, filed herein on November 5, 1959, be, and the same is hereby, Denied.

A True Copy:
Teste:
/s/ Kenneth J. Garrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

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HONORABLE WILLIAM J. CAMPBELL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the Court of Appeals (Pet. App. 1a) is unreported. The order of the District Court is also unreported.

JURISDICTION

The order of the Court of Appeals was entered on November 5, 1959 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 7, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in denying petitioner's application for a writ of mandamus to

annul a District Court order directing separate trials of the issues of liability and damages in a personal injury action.

2. Whether the District Court for the Northern District of Illinois lawfully promulgated Civil Rule 21 which provides that in a civil action the court may, in its discretion, order a trial on the single issue of liability before trying the other issues in the litigation.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

1. United States Constitution, Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

2. Rule 42(b), Federal Rules of Civil Procedure:

> *Separate Trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues.

3. Rule 83, Federal Rules of Civil Procedure:

> *Rules by District Courts.* Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In

all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

4. Rule 21 of the Civil Rules of the United States District Court for the Northern District of Illinois, adopted November 2, 1959:

> Pursuant to and in furtherance of Rule 42 (b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim or third-party claim.
>
> In the event liability is sustained, the Court may recess for pre-trial or settlement conference or proceed with the trial on any or all of the remaining issues before the Court, before the same jury or before another jury as conditions may require and the Court shall deem meet.
>
> The Court, however, may proceed to trial upon all or any combination of issues if, in its discretion, and in furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation.

STATEMENT

This action was brought by petitioner in the District Court for the Northern District of Illinois against the Chicago, Milwaukee, St. Paul and Pacific

Railroad Company on March 26, 1957. Jurisdiction was based on diversity of citizenship. 28 U.S.C. 1332. In his complaint, petitioner alleged that as a result of the railroad's negligence he sustained severe and permanent injuries, both externally and internally. The accident occurred on March 13, 1957, on a railroad crossing, when the taxicab which petitioner was driving collided with a locomotive operated by the defendant railroad. On October 6, 1958, petitioner's action was consolidated with a suit brought against the railroad and petitioner's employer by the administrators of the estates of cab passengers killed in the collision.

Civil Rule 21 adopted by the District Court "[p]ursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation", *supra*, p. 3, provides that the court may order a separate trial on the issue of liability prior to the determination of any other issues if it does not "appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation." If the jury finds liability, the court may recess for a pre-trial or settlement conference or proceed directly to a trial of the remaining issues by the same or another jury "as conditions may require and the Court shall deem meet."

Pursuant to this rule, on November 3, 1959, the District Court (Campbell, Chief Judge, the respondent) ordered a separate trial in the consolidated action before a jury on the single issue of liability. On November 4, 1959, petitioner unsuccessfully moved

Judge Campbell to vacate the order. The next day, petitioner filed an emergency petition for a writ of mandamus in the Court of Appeals for the Seventh Circuit, praying that Judge Campbell's order of November 3, 1959, be annulled. Petitioner urged that the contemplated procedure denied him his right to trial by jury and conflicted with the Federal Rules of Civil Procedure. The Court of Appeals denied the petition (Pet. App. 1a).

ARGUMENT

The decision of the Court of Appeals is clearly correct. First, the rule of the District Court, and the order issued pursuant to that rule, may not be challenged by way of a proceeding for mandamus at this stage of petitioner's litigation. In any event, the District Court's order and the local rule are valid; what petitioner seeks to derogate as an unconstitutional infringement was no more than an implementation, by way of the court's rulemaking power, of Rule 42(b) of the Federal Rules of Civil Procedure. Moreover, there is no conflict with the rulings of other courts. Accordingly, review by this Court is not warranted.

1. The effect of the District Court's challenged order is that petitioner will be obliged to persuade a jury of the merits of his claim that the defendant railroad is liable for the injuries he suffered in the collision, before he will be permitted to present to a jury evidence of the magnitude of his injuries. Clearly, there is no appealable order at this stage. See *Metalock Repair Service, Inc.* v. *Harman*, 216

F. 2d 611 (C.A. 6); *Skirvin* v. *Mesta*, 141 F. 2d 668 (C.A. 10). Nor is this a case in which mandamus could properly have been granted, for its grant would have been "a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30; accord, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546. "This is not a case where a court has exceeded or refused to exercise its jurisdiction * * *, nor one where appellate review will be defeated if a writ does not issue * * *." *Parr* v. *United States*, 351 U.S. 513, 520. Petitioner may, of course, challenge the validity of the District Court rule, and of Judge Campbell's order, after final judgment is entered, if the outcome of the trial is believed to be adverse to his interests. The decision below denying mandamus is therefore in accord with the long-standing "policy against piecemeal appeals." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 178.

2. Furthermore, petitioner has fallen far short of presenting a "clear and indisputable" showing,[1] necessary for the issuance of the writ of mandamus, that Civil Rule 21 of the District Court for the Northern District of Illinois is invalid.

(*a*). Rule 83 of the Federal Rules of Civil Procedure, *supra*, pp. 2–3, authorizes the adoption by each District Court of "rules governing its practice not inconsistent with these rules." The local rule here challenged was adopted to implement Rule 42(b) of the Federal Rules of Civil Procedure, *supra*, p. 2. Under Rule 42(b), the District Court "in furtherance

[1] *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384.

of convenience or to avoid prejudice may order a separate trial of any *claim* * * * or of any separate *issue* * * *" (emphasis added). It is plain on its face that Rule 42(b) contemplates the possibility of a separate trial on the merits of less than an entire "claim", *i.e.*, on an "issue"; and, obviously, the question of whether the defendant is liable to the plaintiff in a personal injury action is a significant "issue" in the action. The courts have therefore universally held that the District Courts are empowered to order a separate jury trial on the issue of liability as a prerequisite to holding a jury trial on the issue of damages.[2] *United States* v. *Burnett*, 262 F. 2d 55 (C.A. 9); *Nettles* v. *General Accident Fire and Life Assurance Corp.*, 234 F. 2d 243 (C.A. 5); *Hassett* v. *Modern Maid Packers, Inc.*, 23 F.R.D. 661 (D. Md.); *Lyophile-Cryochem Corp.* v. *Chas. Pfizer & Co.*, 7 F.R.D. 362 (E.D.N.Y.); *Rickenbacher Transportation, Inc.* v. *Pennsylvania R. Co.*, 3 F.R.D. 202 (S.D. N.Y.); 2 Barron & Holtzoff, *Federal Practice and Procedure* § 943; 5 Moore, *Federal Practice* ¶ 42.03; cf. *Schybinger* v. *The Interlake Steamship Co.*, C.A. 7, No. 12700, decided December 29, 1959, slip op., p. 10.[3]

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[2] The cases cited by petitioner, *McClain* v. *Socony-Vacuum Oil Co.*, 10 F.R.D. 26 (S.D. Mo.); *United States ex rel. Rodriguez* v. *Weekly Publications, Inc.*, 9 F.R.D. 179 (S.D. N.Y.), are not in conflict with this proposition. Both District Courts in those cases approached the problem of whether to order separate trials on the issues of liability and damages as one involving the discretionary exercise of an existing power. Neither case indicates any doubt as to the power of the District Court to order a separate trial on the issue of liability in appropriate cases; they merely declare that it was deemed inadvisable to do so in the circumstances of those cases.

[3] This Court, in *Dalehite* v. *United States*, 346 U.S. 15, a non-jury tort action, noted without objection that a trial had been

The District Court for the Northern District of Illinois, in its local Civil Rule 21, merely sought to put this pre-existing *ad hoc* practice on a regular basis. In adopting the rule, the District Court was motivated by the expectation that a more frequent use of the procedure permitted by Rule 42(b), F.R. Civ. P., would work towards a lessening of calendar congestion in the court.[4] Previous studies had indicated that as many as forty percent of personal injury cases ended in verdicts for the defendant (Zeisel, Kalven & Buchholz, *Delay in the Court*, 99), and, thus, the time and expense of introducing evidence of damages in those cases was wasted. In addition to avoiding this unnecessary waste, it is expected that the rule will tend to stimulate settlements before trial and settlements after a verdict in favor of the plaintiff on the issue of liability.

(*b*). Petitioner's constitutional objections are equally without merit. In essence, it is petitioner's argument that the District Court was without power to order a jury trial of less than all the issues involved in his litigation because the courts at common law, as it existed when the Seventh Amendment was adopted in 1791, lacked such power in similar cir-

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conducted in the District Court on the single issue of the Government's liability for the injuries arising out of the Texas City disaster: the issue of damages had been deferred until the issue of liability was settled.

[4] The existence of calendar congestion in the federal courts needs no documentation. The problem has been recognized by both the Bench and Bar. See, *e.g.*, Warren, *Delay and Congestion in the Federal Courts*, 42 J. Am. Jud. Soc. 6; 1958 *Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation.*

cumstances.[5] It is apparent that petitioner's broad attack on the practice of separating issues for trial goes not merely to the validity of local Civil Rule 21, but also to Rule 42(b), F.R. Civ. P.[6] Indeed, his argument, if accepted, would invalidate all of the Federal Rules of Civil Procedure which in any way represent a change from the procedure governing the conduct of jury trials in 1791. The words of Mr. Justice Brandeis, in *Ex parte Peterson*, 253 U.S. 300, 309–310, furnish the answer:

> * * * The command of the Seventh Amendment * * * does not require that old forms of practice and procedure be retained. * * * New devices may be used to adapt the ancient institution to present needs and to make of it an

[5] In support of this proposition, petitioner refers to Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952). It is interesting to note that this authority, after stating the common-law rule as indicated by petitioner, proceeds to trace the historical development of procedural reform as regards the power of the court to regulate the sequence in which the issues of fact will be determined by the jury. *Id.* at 272–275. Significantly, the author, in discussing Rule 42(b), F.R. Civ. P., as the culmination of this development, suggests no possible constitutional infirmity in the changes from the common-law procedure.

[6] This is actually the force of the argument which petitioner seeks to base on cases such as *United States ex rel. Rodriguez* v. *Weekly Publications, Inc.*, *supra* (fraud), and *McClain* v. *Socony-Vacuum Oil Co.*, *supra* (anti-trust). Given a case in which the proof of damage is inseparably linked to proof of liability, as may have been true in those cases, a District Court would not order separation. Here, of course, there is no such problem. The question of liability easily permits of separate trial, with the problem of damages reserved until liability is determined. Local Civil Rule 21 permits the trial court to take all relevant factors into account. See *supra*, p. 3.

> efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

Accord: *e.g., Galloway* v. *United States*, 319 U.S. 372, 390; *Byrne* v. *Matczak*, 254 F. 2d 525, 529 (C.A. 3), certiorari denied, 358 U.S. 816.

On the basis of this enlightened view of the scope of the Seventh Amendment, Mr. Justice Stone, speaking for a unanimous Court in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 498, concluded "that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." Accord: *e.g., Devine* v. *Patteson*, 242 F. 2d 828 (C.A. 6), certiorari denied, 355 U.S. 821; *Washington Gas Light Co.* v. *Connolly*, 214 F. 2d 254 (C.A.D.C.); *May Department Stores Co.* v. *Bell*, 61 F. 2d 830 (C.A. 8).[7] The *Gasoline Products* decision undercuts

[7] In *Darbrow* v. *McDade*, 255 F. 2d 610, the Court of Appeals for the Third Circuit noted that its decision in *McKeon* v. *Central Stamping Co.*, 264 Fed. 385, relied upon by petitioner (Pet. 8, 11), had been overruled by the Supreme Court in *Gasoline Products Co.* v. *Champlin Refining Co.*, *supra*. *Hodges* v. *Easton*, 106 U.S. 408, disapproved the elimination of certain issues from consideration by the jury; contrary to petitioner's suggestion (Pet. 9), segmentation of issues was not involved. *Barney* v. *Schmeider*, 9 Wall. 248, also involved the withdrawal of issues from the jury (see Pet. 9–10).

petitioner's argument that the Seventh Amendment requires that one jury try all the issues involved in a litigation at the same time. And as the text of local Civil Rule 21 makes clear, no issue of fact will be tried by the court; there is no invasion of the province of the jury. The operation of Civil Rule 21 is intended to regulate the presentation of the issues of fact to the jury in order to make that institution a more "efficient instrument in the administration of justice." *Ex parte Peterson,* 253 U.S. 300, 310. Jury trial is fully preserved.[8]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1960.

[8] Petitioner contends that the procedure contemplated by Civil Rule 21 prevents litigants "from having their day in court" (Pet. 12) because proof of liability for negligence requires a showing of damage. This argument appears to be, in other words, that the rule is unconstitutional because at common law a writ for trespass on the case required an allegation of damage. This pleading contention requires no reply, but it is interesting to note that in the eighteenth century petitioner's action would have been laid in trespass *vi et armis*, and liability would not have depended on proof of damage. 1 Harper & James, *Torts* § 1.3; Prosser, *Torts* (2d ed.) § 7.

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